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IN THE

Supreme Court of the United States

October Term, 1963

No. 168

FRED L. SHUTTLESWORTH,

Petitioner,

—v.—

CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

PETITIONER'S BRIEF

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PETITIONER'S BRIEF

Opinions Below

The opinion of the Court of Appeals of Alabama (R. 59-60) is reported at 149 So. 2d 921. The opinion of the Supreme Court of Alabama (R. 65) is reported at 149 So. 2d 923.

Jurisdiction

The judgment of the Court of Appeals of Alabama (R. 58) was entered on October 23, 1962. An order overruling an application for rehearing in that court was entered November 20, 1962 (R. 61). A petition for writ of certiorari filed in the Supreme Court of Alabama was stricken on December 20, 1962 (R. 67) and an application for rehearing in that court was overruled February 28, 1963 (R. 67). The jurisdiction of this Court rests on 28 United States Code, Section 1257(3), petitioner having asserted below and claiming here the deprivation of rights, privileges and

immunities secured by the Constitution of the United States. The petition for certiorari in this Court was filed May 29, 1963, and certiorari was granted October 14, 1963 (R. 68).

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 856 of the General City Code of Birmingham.

> "Any person who knowingly and wilfully opposes or resists any officer of the city in executing, or attempting to make any lawful arrest, or in the discharge of any legal duty, or who in any way interferes with, hinders or prevents, or offers, or endeavors to interfere with, hinder or prevent such officer from discharging his duty, shall, on conviction be punished as provided in section 4." *

3. This case also involves Section 825 of the General City Code of Birmingham.

> "Any person who commits an assault, or an assault and battery, upon another person, shall, on conviction, be punished as provided in section 4."

4. This case also involves Rule 32 of the Revised Rules of Practice in the Supreme Court of Alabama (Code of Alabama, 1958, Appendix to Title 7, p. 1172).

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* Section 4 of the City Code provides, *inter alia*, for punishment "by a fine not exceeding one hundred dollars, or by imprisonment in the city jail, workhouse or house of correction or at hard labor upon the streets or public works for not exceeding six months, or by both such fine and imprisonment. . . ."

"Rule 32. *Paper of Applications for Bail, Mandamus, etc., Must Correspond with Transcript.*

All applications to this court to admit bail, or for the writ of habeas corpus, mandamus, or other writ or process depending on motion of this court, together with all papers and proceedings touching the same, shall be presented on folio paper, of the pattern now required by the rule for ordinary transcripts, so that the same may be in suitable form for binding; and no application shall be heard that is not so presented."

Questions Presented

1. Whether petitioner was denied due process of law by his conviction on a record devoid of any evidence of guilt?

2. Whether petitioner was denied due process in that he was convicted under a law which failed to give fair warning that his conduct was prohibited?

3. Whether petitioner was denied due process of law when he was charged, tried and convicted under a law prohibiting interfering with a police officer, but the conviction was affirmed on appeal, on the ground that he had committed another crime for which the same sentence might be imposed, i.e., assault, even though there had been no accusation or trial on the issue of assault?

4. Whether there is an adequate non-federal ground which precludes review in this Court where the Alabama Court of Appeals ruled against petitioner on the merits, but the Alabama Supreme Court struck a petition for writ of certiorari that sought to invoke its discretionary jurisdiction on the ground that the petition was on the wrong size paper?

Statement of the Case

Petitioner, Reverend Fred L. Shuttlesworth, was arrested May 17, 1961, at the Greyhound Bus Station in Birmingham, Alabama, and charged with violating Section 856, General City Code of Birmingham of 1944. The complaint filed against him in the Circuit Court of the Tenth Judicial Circuit of Alabama[1] charged that he (R. 4):

> . . . did knowingly and wilfully interfere with, hinder, or prevent a police officer of the City of Birmingham; namely, Jamie Moore, Police Chief for the City of Birmingham, in the discharge of his legal duty in that said defendant did knowingly and wilfully place himself between said officers and a group of people commonly called "freedom riders" when said people were being placed in protective custody by said officer, and said defendant did knowingly and wilfully refuse to move out of the way of said police officer after being so ordered, contrary to and in violation of Section 856 of the General City Code of Birmingham of 1944.

On the day in question, Reverend Shuttlesworth, pastor of a Birmingham church and a well known civil rights leader there (R. 46-47), went to the bus station with a group of persons referred to in testimony as "freedom riders." The group, eighteen or more persons, including petitioner, had tickets for bus travel to Montgomery, Alabama, and arrived at the terminal between two and three o'clock in the afternoon. A crowd had gathered in nearby streets and about thirty to forty police officers were on duty in the area (R. 28-29). Police Captain Garrison said that the

[1] Petitioner was originally charged and convicted of the same offense in the Recorder's Court of the City of Birmingham. He was sentenced to pay $100 fine and to perform hard labor for 180 days in that court. Upon posting an appeal bond (R. 3), he obtained a trial *de novo* in the Circuit Court.

crowd had a "belligerent" attitude directed at the freedom riders (R. 29), and he thought their lives were in danger (R. 27). The police checked to see that all persons in the station were passengers with tickets (R. 25, 28). Shuttlesworth and his group had difficulty in getting transportation when a driver refused to drive a bus scheduled to leave between two and three o'clock (R. 43, 29); the group decided to wait for the next bus (R. 43).

At approximately four o'clock Birmingham Police Chief Jamie Moore went to the station and approached the group on a loading platform. He said: ". . . I went out and told that group of people in a voice loud enough to be heard who I was, I identified myself, and told them that due to the circumstances that day that I as Chief of Police was arresting them and taking them into protective custody of the City of Birmingham" (R. 15). According to the Chief, Shuttlesworth, who had been at a pay phone, "came on out there about the time that I was talking to those people" (R. 16). Then, in the Chief's words (R. 16):

> Well, he [Shuttlesworth] walked around to my left right close to me and got eventually between—I say eventually, it wasn't a lot of time there, and I told him to leave the bus station. I called him by his name, I called him Fred, that he was not concerned with what was happening there, and he walked around and then got between me and some of those people I was talking to and I believe I asked him to go—to get out of my way, and he said, if those people have to be arrested, why, he wanted to be arrested also.

The Chief then ordered that petitioner be taken into custody. On cross-examination Chief Moore gave some slight additional detail. He said that Shuttlesworth was two or three feet away from him, that he spoke to Shuttlesworth first, that petitioner did not put his hands on anyone, and

was not profane or loud (R. 18-19). Chief Moore testified (R. 18):

> A. I told him, "Fred—" I called him Fred—I said, "You are not concerned in this. We are engaged in business," or words to that effect. "You get out of my way and don't bother us."
>
> Q. Well, now, what occasioned you to speak to him at that time? A. He was in my way and he was asking what was happening, what was taking place, and I had already announced to those people in a good loud clear voice who I was and my intention.
>
> Q. Now, did he do anything other than ask those questions as to what was happening? A. He walked around to my left and was between me and some of those people.
>
> Q. Did he do any other act? A. Your Honor, I would like for him to ask specifically, if he will, what he has in mind there.
>
> Q. Did he do any physical act? Did he put his hands on anyone? Did he do anything other than ask the questions and walk around to your left? A. He didn't put his hands on anyone that I saw, if that is what you are talking about.
>
> Q. Was he profane, Chief, or loud? A. He wasn't.
>
> Q. Or argumentative? A. He was not profane.
>
> Q. Was he loud and argumentative while talking to you? A. I wouldn't say he was loud.

It may be noted that there was no statement that Shuttlesworth blocked the Chief's path or that the Chief was trying to walk anywhere; the Chief merely said that petitioner "walked around and got between me and some of the people I was talking to" (R. 16), and that "he was in my way and he was asking what was happening, what was taking place" (R. 18-19).

The entire group was arrested without resistance (R. 26) and taken to the City Jail,[2] but no charge was made against any member of the group except Shuttlesworth (R. 19, 54); the rest of the group finally got a bus to Montgomery the following Saturday (R. 23).

The testimony of police Captain Garrison who was standing with Chief Moore at the time of the arrest was substantially the same as the Chief's. On cross, Captain Garrison was asked (R. 25):

> Q. Did he at any time exhibit any pugnacious attitude? Did he put his hands on anyone or offer any argument? A. Not verbally, but he didn't move.
>
> Q. But he asked what was going on and he didn't move? A. To the best of my recollection he asked what was going on and he did make the one statement that if they were placed in jail he wanted to go too.

Another officer, Captain Warren, described the incident in similar fashion,[3] stating that neither the Chief nor the petitioner raised his voice in speaking to the other (R. 35).

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[2] One member of the group said that she was confined in the City Jail for 12 hours before she was released without being charged (R. 54).

[3] Captain Warren testified (R. 34):

"A. The conversation, such as it was that took place between Chief Moore and the Reverend Shuttlesworth was at the forefront of the group of Freedom Riders. The Chief was at the front of them at the bus and the Reverend Shuttlesworth was there and the Chief endeavored then after he placed them under protective custody to get them down the ramp toward the waiting patrol wagon, and the Reverend Shuttlesworth was in between the Chief and the Freedom Riders going along with them after having been asked not to interfere.

Q. So, he was going along with them down the ramp? A. That is correct.

Q. Towards the waiting patrol wagon? A. In that general direction, yes."

Police officer Trammell testified that when the Chief addressed the group Shuttlesworth "wanted to know why they were being placed under protective custody" (R. 36); he heard the Chief ask him to move out of the way but did not recall whether petitioner did move (R. 37). He said that the group was standing at a bus stall, apparently about to board a bus, when the Chief came up; and that he arrested petitioner on instructions of his superior officer (R. 40).

Shuttlesworth testified that he was with the group when Chief Moore walked up to them. His version of the conversation was as follows (R. 43-44):

> A. He identified himself and said, "I am Chief Moore," or words to that effect, Chief of the Birmingham City Police, and we have decided to arrest you all for your own protection."
>
> And I asked him what did he say, and he said he decided to arrest us for our own protection. And then he recognized me in the crowd and he said, "Shuttlesworth, are you with the group?"
>
> I said, "I am. We have been trying to get the bus out for two hours or more."
>
> And he said, "Well, you go on, I don't want any trouble out of you."
>
> And I said, "I am with the group and I want to catch a bus." And he said, "If you don't go on, I will have to arrest you." And I said, "Well, whatever happens on all them will happen to me; we are all together."
>
> So, he asked—I don't know—one of the officers to arrest me, and they took me in the patrol car and the rest of them in the wagon. We all started off about the same time.

Testimony by defense witness Vera Brown was similar (R. 53-54).

In short, all the witnesses agreed that petitioner was entirely peaceful in his conduct and in his language; that he did nothing to resist arrest or to stop his companions from being arrested; and that he merely inquired why they were being arrested and asked that he be treated as his companions were. Neither the Chief nor any of the other officers gave any indication why it was desired to arrest each member of the group of freedom riders except Shuttlesworth, and place them under "protective custody."

On December 5, 1961, petitioner was tried before the Circuit Court sitting without a jury and found "guilty as charged in the complaint" (R. 10). The trial court rendered no opinion. Shuttlesworth was sentenced to 180 days at hard labor and a $100 fine and costs. In default of payment of the fine and costs he is to serve additional 52 day and 16 day periods at hard labor (R. 10-11).

Prior to, during, and after the trial petitioner made appropriate motions objecting to the ordinance, the complaint, and the conviction on Fourteenth Amendment grounds (Motion to Quash, R. 5-6; Demurrers, R. 7-8; Motion to Exclude, R. 8-9); each of the motions was overruled (R. 9-10, 13, 42, 55). On appeal to the Court of Appeals of Alabama, petitioner assigned as errors the overruling of the motions mentioned above (R. 56). The Court of Appeals affirmed in a brief opinion (R. 59-60), in which it described "protective custody" as "the receiving of someone who places himself voluntarily under the protection of a peace officer." The Court mentioned petitioner's argument that the Chief was not acting in the discharge of any legal duty but said that this argument "can avail the appellant nothing, because his conduct was also that prohibited by §825 of the City Code which provides for the same degree of punishment as §856, §825 making it an offense against the City for any person to commit an assault" (R. 60).

The Court referred to the common law definition of assault, and said that "it is our view that an assault is an offense included in §856 in the alternative here pertinent" (R. 60). The Court then concluded (R. 60):

> Inasmuch as Shuttlesworth blocked the chief's path using words from which the intent to do so "in rudeness or in anger" could probably and rationally be inferred, there was no error in his conviction, since he could have been clearly convicted of a simple assault.

After the Court of Appeals denied rehearing (R. 61), Shuttlesworth petitioned the Supreme Court of Alabama to grant a writ of certiorari (R. 62-64), and filed a brief to which the City filed a reply brief likewise addressed to the merits of the case. The Supreme Court of Alabama, however, ordered that the petition for certiorari be stricken because it was not filed on "transcript paper" as required by that court's Rule 32 (R. 65), and denied rehearing (R. 66).

Summary of Argument

Petitioner was denied due process of law secured by the Fourteenth Amendment in that he was convicted of crime without evidence of guilt. He was charged with interfering with an officer in the exercise of his legal duty. The police, however, were not exercising any legal duty when they took freedom riders into "protective custody." There appears to have been no such concept as "protective custody" in Alabama law, prior to petitioner's arrest, but as defined by the Alabama Court of Appeals, such custody contemplates a voluntary surrender, which did not occur here. In fact, the police illegally arrested freedom riders in the exercise of federally protected rights. But beyond this, petitioner did not, in fact, "interfere" with the police in

whatever it was they were doing. He was merely politely and quietly inquiring concerning their treatment of his companions.

That petitioner was not guilty of "interfering" may be discerned from the fact that the Court of Appeals evaded passing on the validity of the conviction for *that* offense, but affirmed by holding petitioner guilty of the crime of *assault*, which is punishable by the same penalty as interfering. But neither was there evidence of "assault." The Alabama law of assault has heretofore involved some element of violence as indicated by the cases cited below. There was, however, no violence here. Petitioner was held to have committed an assault because he spoke in "rudeness and anger," but neither is there any evidence that this occurred.

Moreover, the ordinances under which petitioner was charged and convicted are unconstitutionally vague as applied to his situation. Neither the ordinance dealing with interfering with a police officer, not that forbidding assault gives any notice that mere inquiry of a police officer as to why he is arresting one's companions in the lawful exercise of their rights as bus passengers constitutes either the crime for which petitioner was originally convicted or the crime for which he was held guilty in the Court of Appeals.

The conviction below also should be reversed because it was affirmed under an ordinance, the violation of which had not been charged, contrary to the due process clause of the Fourteenth Amendment. Petitioner was charged with interfering with the police officer but the conviction was affirmed on the ground that he had committed an assault. *Cole* v. *Arkansas*, 333 U. S. 196, holds that it is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried

as it would be to convict him upon a charge that was never made. *Cole* is directly in point.

This Court has jurisdiction to review the cause notwithstanding refusal by the Supreme Court of Alabama to review for the reason that the petition filed with it was not on transcript paper. Certiorari in this case properly runs to the Alabama Court of Appeals, the appellate court below the State Supreme Court, and the highest court of the state in which a review of right could be had. The Court of Appeals heard and necessarily disposed of the constitutional claim. The State Supreme Court could have considered the merits despite the procedural flaw but exercised a discretionary power not to pass upon these claims, and where it has discretion either to hear or not to hear, its refusal to pass upon the federal questions cannot rob this Court of jurisdiction. Moreover, its refusal was based upon a highly formalistic and technical procedural rule which has no relation to the decision making process, the rights of the parties in this case, or the administration of the flow of business in the Alabama courts as it affects the rights of other litigants. The rule relating to the size of paper of certiorari petitions is based upon the fact that the record racks in the clerk's office are of a certain size and relates to binding of the record. There is no adequate and substantial nonfederal ground which precludes review here.

Finally, the judgment of the Alabama Court of Appeals, the highest court where review could be had as a matter of right, is reviewable here notwithstanding the fact that the Alabama Supreme Court may have declined to exercise its discretionary certiorari jurisdiction because of an adequate state law ground.

ARGUMENT

I.

Petitioner Was Denied Due Process in That He Was Convicted of a Crime on a Record Devoid of Evidence of Guilt.

The judgment below should be reversed because there was no evidence of petitioner's guilt of any crime. *Thompson* v. *Louisville*, 362 U. S. 199; *Garner* v. *Louisiana*, 368 U. S. 157; *Taylor* v. *Louisiana*, 370 U. S. 154.

Because of the peculiar treatment which the Alabama Court of Appeals accorded this case—putting aside the charge of interfering with an officer (Section 856) and finding petitioner guilty of another offense, i.e. assault (Section 825)—petitioner's argument is divided as follows. First, it will be demonstrated that there was no evidence that petitioner interfered with Chief Moore in the discharge of any legal duty as charged in the complaint. Second, it will be shown that there was no evidence that petitioner committed an assault. In a subsequent portion of the argument (part II), it will be shown that neither ordinance gave fair warning that petitioner's conduct was criminally punishable, and that the conviction thus denies him due process on the ground of vagueness. Then it will be urged (in part III of the argument) that the affirmance of petitioner's conviction on the theory that he committed an assault—in violation of an ordinance under which he had been neither charged, tried, nor convicted—violated due process.

A careful review of the trial evidence leads to the inescapable conclusion that there was no proof that petitioner interfered with, hindered, or prevented Chief Moore from discharging any legal duty. Indeed this failure of proof

might be surmised from the manner in which the opinion of the Alabama Court of Appeals attempted to escape the issue by holding petitioner guilty of another offense subject to the same punishment. "There was no error in his conviction," the Court of Appeals held, "since he could have been clearly convicted of a simple assault" (R. 60).

This attempt to circumvent the question of whether there was evidence to sustain the charge under §856 is readily explainable when it is considered that there was no evidence either that Chief Moore was performing any legal duty or that Shuttlesworth interfered with, hindered, or prevented its exercise. Chief Moore walked up to the group of persons traveling with petitioner and announced peremptorily that he "was arresting them and taking them into custody of the City of Birmingham" (R. 15). Petitioner, who according to the Chief arrived during this announcement (R. 16) immediately walked up to the Chief and asked "what was happening, what was taking place" (R. 18-19). The Chief told Shuttlesworth "to leave the bus station", "to get out of my way", and that "he was not concerned with what was happening there". When Shuttlesworth did not move, but responded by saying "if those people have to be arrested, why, he wanted to be arrested also" (R. 16) then the Chief ordered him placed under arrest and subsequently charged him under §856. Shuttlesworth and the group of freedom riders traveling with him were arrested without any resistance.

First, it is obvious that Chief Moore was not performing a "legal duty" or even a lawful act in purporting to arrest Shuttlesworth's companions for "protective custody". No such crime or concept as "protective custody" appears in the Birmingham or Alabama Codes. The Alabama Court of Appeals said protective custody was "the receiving of some one who places himself voluntarily under the protection

of a peace officer" (R. 59). There is nothing in the record to indicate that Chief Moore intended that the group would have any choice—he told them that he "was arresting them" (R. 15); nothing shows that they agreed to the custody. Certainly if he was asking that the group voluntarily submit to his custody for protection, petitioner's questions as to what was going on would have been entirely natural and appropriate. But actually it rather plainly appears that the group was given no choice about the matter, that the arrest was unjustified, and that petitioner's questions were appropriate in the context of an unjustified arrest. It is quite clear that the members of the group had violated no law which justified an arrest by Chief Moore. They had a right to use public buses without regard to racial segregation customs (*Boynton* v. *Virginia*, 364 U. S. 454; *Gayle* v. *Browder*, 352 U. S. 903), and their right may not be abridged on account of "the possibility of disorder by others" (*Wright* v. *Georgia*, 373 U. S. 284; *Taylor* v. *Louisiana*, 370 U. S. 154; *Garner* v. *Louisiana*, 368 U. S. 157, 174; cf. *Buchanan* v. *Warley*, 245 U. S. 60, 80-81; *Cooper* v. *Aaron*, 358 U. S. 1).

As the freedom rider group had not committed any crime —there has never been any claim that they did—their arrest was unlawful. Alabama law authorizes arrests only under warrant (Tit. 15, Ala. Code §153), or without a warrant for offenses in the presence of an officer or where there is "reasonable cause" to believe the person has committed a felony (Tit. 15, Ala. Code §154). See *Daniels* v. *Milstead*, 221 Ala. 353, 128 So. 447 (1930). The Fifth Circuit recently said that "There is yet no single Alabama case to indicate that the suspected threat of mob violence at the hands of the law breakers may be avoided by arresting those whose actions are perfectly peaceful and legally and constitutionally protected merely because such lawful and peaceful conduct provocatively incites the incipient mob." *Nesmith*

v. *Alford*, 318 F. 2d 110, 120 (5th Cir. 1963). Whatever the Alabama law governing arrests without warrants might be, surely there was nothing in the freedom riders' peacefully waiting for a bus that could meet the test of "probable cause" embodied in the Fourth Amendment (*Henry* v. *United States*, 361 U. S. 98, 102) and made applicable to the states by the due process clause of the Fourteenth (*Wolf* v. *Colorado*, 338 U. S. 25; *Mapp* v. *Ohio*, 367 U. S. 643; *Ker* v. *California*, 374 U. S. 23). The Fourth Amendment no more permits arrests for "protective custody" than it permits arrests on "suspicion" or arrests "for investigation". *Henry* v. *United States*, *supra*; cf. Mr. Justice Douglas, "Vagrancy and Arrest on Suspicion", 70 Yale Law J., 1, 12-13. The sum of the matter is that if Shuttlesworth did interfere with Chief Moore, it was while the latter was making an illegal arrest and not while he was performing a legal duty.

But Shuttlesworth's mere act of asking the Chief what was happening did not "interfere" with the arrests or "prevent or hinder" them. The Chief had already told the assembled group that they were under arrest and none resisted in any way. Nor can Shuttlesworth's failure to instantly obey the chief's command "to go—to get out of my way" and "to leave the bus station" constitute an unlawful interference with the Chief. This did not in fact prevent or hinder the arrests, but in any event Shuttlesworth had no duty to "obey the command of an officer if the command itself is violative of the Constitution" (*Wright* v. *Georgia*, 373 U. S. 284), and Shuttlesworth had a plain right to be in the bus station, as well as to inquire as to the reason for the arrest of his companions.

It is also apparent that petitioner never assaulted Chief Moore or anyone else, at least as assault has been defined

in prior Alabama decisions and as it was defined by the Court of Appeals in this case.

Neither the Birmingham City Code (§825), nor the Alabama Code (Tit. 14, §33) contain any definition of the crime "assault"; the court below made reference to the common law definition of the crime without elaboration or citation (R. 60). But the Alabama courts have many times set out their common law definition of assault in language which clearly excludes petitioner's conduct. They have defined assault as "any attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote, at the time, an intention to do it, coupled with a present ability to carry such intention into effect." *Tarver* v. *State*, 43 Ala. 354, 356 (1869). To the same effect see *Flournoy* v. *State*, 270 Ala. 448, 451, 120 So. 2d 124 (1960); *Taylor* v. *State*, 27 Ala. App. 538, 175 So. 698 (1937); *Burton* v. *State*, 8 Ala. App. 295, 62 So. 394 (1913); *Naler* v. *State*, 25 Ala. App. 486, 148 So. 880 (1933). There was simply no evidence at all that Shuttlesworth made any "attempt or offer" to "do a corporal hurt" to Chief Moore, and there is not a hint of "force or violence" on his part.

It is mystifying to ponder how the Court of Appeals could have thought petitioner guilty of assaulting Chief Moore without finding him guilty of interfering with him. In any event, the Court of Appeals found an assault because it said that petitioner "blocked the chief's path using words from which the intent to do so 'in rudeness or in anger' could probably and rationally be inferred". Apart from the fact that this was a new and unique statement of the Alabama law of assault, and that none of the cases cited by the court below remotely resemble what occurred here,[4] there was simply no evidence that petitioner either

[4] Among the cases cited by the court below were *Patterson* v. *Sylacauga*, 40 Ala. App. 239, 111 So. 2d 25 (1959) where the

"blocked the chief's path" or used any words "in rudeness or in anger". There was no evidence that the Chief was attempting to walk anywhere, and none that petitioner "blocked his path" or barred his way. At most petitioner moved in front of the chief to ask him a question while the chief was standing and talking with the group. There was nothing to indicate that petitioner's language was rude or angry in tone or in content; indeed, all the evidence is to the contrary. There is nothing unusual, and certainly no assault, in standing near a person while talking to him, which is all that the evidence shows Shuttlesworth did.

It is a "violation of due process to convict and punish a man without evidence of his guilt". *Thompson* v. *Louisville*, 362 U. S. 199, 206. Inquiring of a police officer as to what is happening to one's companions when they are ordered arrested in "protective custody", and refusing to leave a bus station where one has a right to be as a paying passenger, is neither an interference with an officer under Birmingham Code §856 nor an assault punishable under city code §825. The conviction should be reversed and the petitioner discharged.

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defendant, among other things, advanced on an officer with a butcher knife and subsequently knocked him across a room; *Kennedy* v. *State*, 39 Ala. App. 676, 107 So. 2d 913 (1958) where the defendant fought with the sheriff until two deputies came to his assistance and subdued him; and *Anderson* v. *United States*, 132 A. 2d 155 (D. C. Mun. Ct.) aff'd 253 F. 2d 335 (D. C. Cir. 1957) where the defendant pushed a policeman.

II.

The Law Under Which Petitioner Was Convicted Is Unconstitutionally Vague and Fails to Warn That Petitioner's Conduct Is Made Criminal.

The factors which make it apparent that there was no evidence to support the conviction under §856 (and/or §825) may also enable it to be perceived as constituting a conviction based upon a law (or laws) which failed to give fair warning. Indeed *Thompson* v. *Louisville*, 362 U. S. 199, 206; rested in part upon *Lanzetta* v. *New Jersey*, 306 U. S. 451, a leading case articulating the vice of vague criminal laws. Petitioner had a perfect right, founded on the Fourteenth Amendment, to be present and to await his bus in the public bus terminal and a similar right to inquire as to the basis for the unlawful arrest of his companions. As this Court said in *Wright* v. *Georgia*, 373 U. S. 284:

> ". . . a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute. Cf. *Winters* v. *New York*, 333 U. S. 507; *Stromberg* v. *California*, 283 U. S. 359; see also *Cole* v. *Arkansas*, 333 U. S. 196."

There is nothing in §856 which gives warning that one can be punished for refusing to obey an officer's unjustified command to leave a public bus terminal, or punished for a mere peaceful inquiry as to the reason for an officer's arrest of one's companions, and certainly not where the officer's contemporaneous statement of the basis for the arrest—e.g. "protective custody"—plainly reveals it to be an unlawful arrest. The assault ordinance equally fails to warn

that this type of peaceful conduct is punishable, there being nothing in the text of the ordinance or in the common law definition of assault often repeated by the Alabama courts from which one could so infer. It would require extraordinary prescience to know that a conversation such as petitioner's conversation with Chief Moore is criminally punishable. Convictions under criminal laws which give no adequate notice that the conduct charged is proscribed violate the due process clause of the Fourteenth Amendment. *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Connally* v. *General Construction Co.*, 269 U. S. 385; *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Edwards* v. *South Carolina*, 372 U. S. 229.

III.

Petitioner's Conviction Was Affirmed Under a Criminal Statute, the Violation of Which Had Not Been Charged, Contrary to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

This Court's holding in *Cole* v. *Arkansas*, 333 U. S. 196, compels reversal of this conviction. The complaint under which petitioner was charged, tried and convicted alleged that he "did knowingly and wilfully interfere with, burden or prevent a police officer of the City of Birmingham; . . . in the discharge of his legal duty," "in violation of Section 856" of the Birmingham City Code.

Petitioner argued to the Alabama Court of Appeals that his conviction under §856 should be reversed because based on no evidence. Without discussing this issue, the Court of Appeals held that "there was no error in his conviction since he could have been clearly convicted of simple assault" under §825 (R. 60).

Whatever may be the meaning of the two city ordinances involved here, it is clear that they proscribe separate and distinct offenses, notwithstanding that they are both punishable under the same code provision which deals with all misdemeanors under the Birmingham Code. The problems of proof and defense are obviously different. Whatever the relationship between the two laws, and the opinion below leaves this in substantial confusion, it is clear that the complaint never warned Shuttlesworth that he had to defend against a charge of assault or be at all concerned with §825, and that the trial court never found him guilty under §825.

This disposition of the appeal denies due process, for it rests affirmance upon an assault ordinance under which petitioner had never been charged, tried or convicted. Indeed the word "assault" was never mentioned at any time during the trial. This disposition of the case disregards one of the most fundamental requirements of due process—that a person be informed of the specific charge made against him and be heard in defense thereof. An affirmance of this kind in effect convicts the defendant without a trial, as was noted in *Cole* v. *Arkansas*, 333 U. S. 196, unanimously reversing a conviction in similar circumstances:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. Re Oliver, 333 U. S. 257, 273, decided today and cases there cited. . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on

> which he was never tried as it would be to convict him upon a charge that was never made. *Dejonge* v. *Oregon*, 299 U. S. 353, 362. (333 U. S. at 201.)

Where, as here, a state provides an appellate procedure, the proceedings in the appellate court are "a part of the process of law" under which a defendant is held in custody, and must meet basic standards of fairness. *Cole* v. *Arkansas*, 333 U. S. at 201. This Court has not departed from the simple and just proposition stated in *Cole*,[5] and should not do so now.

IV.

This Court Is Not Precluded From Reviewing the Judgment of the Court of Appeals of Alabama Where the Supreme Court of Alabama Refused to Consider the Merits Because the Certiorari Petition Filed There Was Not on "Transcript Paper."

Discussion of the procedural issues appropriately may begin with 28 U. S. C. §1257 which confers jurisdiction on this Court to review certain judgments of "the highest court of a State in which a decision could be had." One seeking review here must have utilized all available procedures for obtaining review of an inferior state court decision in the state's highest court, whether it is available as of right[6] or only in the discretion of the state courts.[7] But when a litigant reaches a "dead end" short of the state's highest court (as here where there is no further review

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[5] The *Cole* case has been cited with approval in *Garner* v. *Louisiana*, 368 U. S. 157, 164; *Paterno* v. *Lyons*, 334 U. S. 314, 320; and *Thompson* v. *Louisville*, 362 U. S. 199, 206.

[6] *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186.

[7] *American R. Express Co.* v. *Levee*, 263 U. S. 19.

as of right and efforts to secure further discretionary review have failed), this Court may review the judgment of the inferior court since it is the highest one "in which a decision could be had."[8] These settled propositions clearly point to the Court of Appeals of Alabama as the highest court "in which a decision could be had" in the circumstances of this case. Decisions by that court were reviewed here in *Anderson* v. *Alabama*, 364 U. S. 877; *Gober* v. *Birmingham*, 373 U. S. 374; and *Shuttlesworth* v. *Birmingham*, 373 U. S. 262.

The relevant Alabama law grants to the Court of Appeals of Alabama "final appellate jurisdiction . . . of all misdemeanors, including the violation of town and city ordinances" (Title 13, Ala. Code §86). Petitioner could obtain review of that court's decision only by seeking a writ of certiorari in the Supreme Court of Alabama, which is empowered to issue "such other remedial and original writs as may be necessary to give it general superintendence and control of inferior jurisdictions" (Ala. Const. of 1901, §140), and which has provided for exercise of this power by considering applications for writs of certiorari "for the purpose of reviewing or revising any opinion or decision of the court of appeals" (Ala. Supreme Court Rule 39, Appx. to Tit. 7, Ala. Code 1958, pp. 1178-1179).[9]

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[8] *American R. Express Co.* v. *Levee*, *supra*.

[9] Rule 39 provides:

CERTIORARI TO COURT OF APPEALS.

This court will not in term time, nor will the justices thereof in vacation, receive or consider an application for the writ of certiorari, or other remedial writ, or process, for the purpose of reviewing or revising any opinion or decision of the court of appeals, nor entertain, consider, or issue a writ of error, as authorized by section 98 of Title 13 of the Code, unless it appears upon the face of the application therefor that application has been made to said court of appeals for a rehearing of the point or decision complained of, and that said application had been

When petitioner's conviction was affirmed by the Court of Appeals, and it denied rehearing, he sought certiorari (clearly the proper remedy) in the Supreme Court by filing a timely petition and an appropriate supporting brief. This attempt to invoke the discretionary certiorari jurisdiction of the Supreme Court was conformable to the established rules and practice except in one respect, i.e., petitioner did not comply with Alabama Supreme Court Rule 32 governing the type of paper to be used for such petitions. Rule 32 stipulates *inter alia* that applications for " . . . the writ of habeas corpus, mandamus, or other writ or process depending on motion of this court, . . . shall

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decided adversely to the movant, and the application to this court must be filed with the clerk of this court within fifteen days after the action of said court of appeals upon the said application for rehearing. The application for any such writ must be accompanied by a brief pointing out and arguing the point or decision sought to be revised or corrected. If the court, upon preliminary consideration, concludes that there is a probability of merit in the petition and that the writ should issue, it shall be so ordered, of which due notice shall be given by the clerk to the parties or their counsel, and the case shall stand for submission, as herein provided, on briefs and likewise oral argument if so desired. If oral argument is desired by petitioner, statement to that effect shall be filed with the clerk by petitioner within ten days after service on petitioner of the notice of issuance of the writ. If oral argument is desired by respondent, then he or his counsel shall, by endorsement on the last page of his brief, so state his desire. If neither party shall thus indicate a desire for oral argument, the clerk of this court shall, when briefs from all parties have been filed with him as herein provided, immediately submit the case in term time upon the transcript and such briefs. If either party shall have made known a desire for oral argument, the clerk of this court shall endorse that fact on the proper docket and set the case down for oral hearing not less than ten days after notifying the parties, or their attorneys of record, in writing of such setting. Cases so set for oral argument shall be heard on the day set unless continued by the court for good cause shown.

Respondent's brief shall be filed with the clerk of this court within fifteen days after service on respondent of the notice of the issuance of the writ, and if not filed within that time, or within any extended time, the cause shall stand ready for submission.

be presented on folio paper, of the pattern now required by the rule for ordinary transcripts, so that the same may be suitable for binding; and no application shall be heard that is not so presented." The paper mentioned is about 10½ x 16 inches in size.[10] Petitioner ran afoul of this rule when his attorneys filed the petition for certiorari on ordinary legal cap paper (8½ x 14 inches) and the court below entered an order striking the petition for certiorari.[11]

It is submitted that this procedural lapse cannot deprive this Court of jurisdiction for several reasons, stated here summarily, and elaborated below. First, the Alabama Supreme Court could have exercised its discretionary jurisdiction and considered the merits of the petition notwithstanding the procedural flaw. Such a discretionary refusal to consider a federal claim cannot prevent this Court from exercising jurisdiction. *Williams* v. *Georgia*, 349 U. S. 375.

Second, assuming, *arguendo*, that the Alabama Supreme Court was without discretion to review the petition not on transcript paper, the rule so harshly works a forfeiture by exalting form and ritual that it cannot, in view of the opposing interests at stake, be regarded as a state ground for decision adequate and substantial enough as to prevent review here. *Staub* v. *Baxley*, 355 U. S. 313; *Rogers* v. *Alabama*, 192 U. S. 226.

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[10] "Rule 21. Paper of Transcripts

"All transcripts of records must be on paper of uniform size, according to the same furnished by the clerk of the supreme court, with a blank margin, at the top, bottom, and sides of each page, of an inch and a half, exactly conforming to those marked on the sample."

[11] The record does not reveal the reason why paper other than transcript paper was used. But it is relevant to consider the extremely heavy volume of civil rights litigation handled by only a very few lawyers in some states in understanding how this could have occurred. See 1963 Report of the United States Commission on Civil Rights, 117-119.

Finally, even where a state Supreme Court's refusal to grant a discretionary review is based on an adequate state ground, the federal questions necessarily decided by the intermediate appellate court are properly reviewable in this Court. Cf. *Hammerstein* v. *Superior Court*, 341 U. S. 491.

To consider the above points in detail, it is first submitted that the Alabama Supreme Court did have discretion to consider the merits of Shuttlesworth's petition despite the fact that it was not on transcript paper. As will be demonstrated, the Alabama courts have considered the merits of cases despite noncompliance with the transcript paper rule (Rule 32) as well as other Supreme Court rules. Rule 32 was adopted by the Court in 1865[12] and was first applied to strike a certiorari petition in 1946.[13] Earlier the rule had been applied to mandamus petitions[14] and since 1946 it has been applied on a number of occasions.[15] But in cases involving both mandamus and certiorari petitions

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[12] The rule appears at 38 Ala. 12 (January term 1866), and in subsequent Codes and Supreme Court reports without amendment except for its number.

[13] *Peterson* v. *State*, 248 Ala. 179, 27 So. 2d 30 (1946).

[14] *Aust* v. *Sumter Farm & Stock Co.*, 209 Ala. 669, 96 So. 2d 872 (1923) (mandamus denied because not on transcript paper). The *Aust* case is the first such use of the rule. Earlier the court had indicated that it would tolerate some "informality" in requests for mandamus, though it was not clear in what respect the requests for mandamus did not conform to this rule. See *Ex Parte Tower Manufacturing Co.*, 103 Ala. 415, 15 So. 836 (1893), and *Brady* v. *Brady*, 144 Ala. 414, 39 So. 237 (1905), both of which are discussed in *Ex Parte Jackson*, 212 Ala. 496, 103 So. 558 (1925).

[15] The Court has on occasion said such things as "the requirement of Supreme Court Rule 32 is mandatory" (*Accardo* v. *State*, 268 Ala. 293, 105 So. 2d 865 (1958)) and "we have no alternative but to strike" the petition (*Metropolitan Life Ins. Co.* v. *Korneghy*, 260 Ala. 521, 71 So. 2d 301 (1954)). But in the many decisions under the rule the Alabama courts have never expressly stated that noncompliance deprived the court of jurisdiction, and the force of the above quoted statements is weakened by the courts' actual actions in the cases discussed in the text *infra*.

not tendered on transcript paper the Alabama courts have demonstrated their power to consider the merits. The first such case was *Ex Parte Wood*, 215 Ala. 280, 110 So. 409 (1926), involving a petition for mandamus to review a decree fixing alimony *pendente lite*. The petition was not filed on transcript paper, but the court nevertheless delivered a lengthy holding that petitioner had not sustained his burden of proof, before adding that "another reason" for denying the petition was the transcript paper rule. Then in *Houston* v. *State*, 265 Ala. 588, 93 So. 2d 439 (1957), the court "struck"[16] a nonconforming certiorari petition but only after having acceded to a request to consider the merits. The Court said:

> Subsequent to submission, appellant became aware that the petition was not on transcript paper and requested leave to remedy this defect. In view of this request, *we have considered the petition on its merits and find no reason to reverse* the judgment of the Court of Appeals. The writ would have been denied had the application not been stricken. (Emphasis supplied.)

While the action of the Court in *Houston* was not unambiguous, and the court has rejected a subsequent attempt to induce it to consider the merits of such cases,[17] the one

[16] And it will be noted that in the opinion below in this case, and in many others, the Alabama Courts have said that such petitions were "stricken." But the significance of this terminology is not apparent because the court has seemingly used the terms "denied" and "dismissed" interchangeably with "stricken" in transcript paper cases. See *Ex Parte Wood, supra; Aust* v. *Sumter Farm & Stock Co., supra* ("denied"); *Elks Lodge* v. *State*, 264 Ala. 223, 86 So. 2d 396 (1956) ("denied"); *Bates* v. *General Steel Tank Co.*, 256 Ala. 466, 55 So. 2d 218 (1951) ("dismissed"); *Maddox* v. *City of Birmingham*, 255 Ala. 440, 52 So. 2d 166 (1951) (same); *Stovall* v. *State*, 257 Ala. 116, 57 So. 2d 642 (1952) (same); *Morgan Plan Co.* v. *Beverly*, 255 Ala. 235, 51 So. 2d 179 (1951) (dismissed; denied).

[17] See, e.g., *Jemison* v. *State*, 270 Ala. 589, 120 So. 2d 751 (1960).

clear thing about *Houston* is the court's plain statement that *it did consider the merits* of the petition. Even more striking is the action of the Alabama Court of Appeals (which is bound by the same Rule 32) in *Ex Parte Nations*, 154 So. 2d 762 (1963). Nations, a prisoner appearing *pro se*, sought certiorari to review an unfavorable trial court ruling on his habeas corpus petition, and the Attorney General moved to dismiss on several grounds including failure to use transcript paper. However, the Court said that it was "not disposed to cut off a prisoner's post-conviction remedies merely on the bald reference to the Rule" and went on to "dismiss" the petition and "deny" the writ on the ground that it sought to "rehash" claims made in earlier habeas corpus proceedings. The Court stated the purpose of Rule 32 was "to leave well bound records" and added:

> . . . The size of the paper has prescribed the size of the record racks and the use of much space in the Judicial Building. To change the system of record keeping would entail a considerable expense. Moreover, the use of noncomplying paper (unless promptly filmed) gives no assurance against fading and rot.

While the *Nations* opinion made reference to the problem of whether litigants have the means to secure transcript paper, there was no statement that such paper was not available to Nations or that he had even so contended. It can only be inferred that the Court found it sufficient that the state made no showing that the paper was available to this particular prisoner.

In addition to these cases where the court has considered the substance of a case before it notwithstanding that it was not on transcript paper, it is worthwhile to consider cases where the court has condoned infringement of its other rules. In *Mitchell* v. *Helms*, 270 Ala. 8, 115 So. 2d 664 (1959), a litigant who wrote his assignments of error

on transcript paper but did not have them bound into the record was subsequently allowed to "write the assignments on the transcript" before submission of the case.[18] The Court has also been liberal in excusing non-compliance with its rules prescribing the contents of briefs, thus further demonstrating its discretionary power to excuse violations of its own rules.[19]

This, then, is a case where the Court had power to consider the merits but declined to do so, and *Williams* v. v. *Georgia*, 349 U. S. 375, should apply. In *Williams*, the state courts had power to consider and grant an extraordinary motion for new trial but refused. This Court concluded that "the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us" (349 U. S. at 389).

Second, even if it be assumed, contrary to the demonstration above, that the Alabama Supreme Court was without discretion to review the petition, this harsh and ritualistic rule cannot be regarded as such an adequate and substantial state ground for decision as to prevent review here.

Under Alabama practice the certiorari petition itself is a relatively brief document setting out the claims and

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[18] Cf. *Hunter* v. *L. & N. R.R. Co.*, 150 Ala. 594, 43 So. 802 (1907), permitting a litigant, on rehearing, to correct an error in filing his assignments of error on separate sheets of paper. But see *contra*: *Pugh* v. *Hardyman*, 151 Ala. 248, 44 So. 389 (1907); *Gates Lumber Co.* v. *Givens*, 181 Ala. 670, 61 So. 30 (1913); *Patton* v. *Colbert County*, 265 Ala. 682, 92 So. 2d 691 (1957). See also, *Wilson* v. *Howard*, 266 Ala. 636, 98 So. 2d 425 (1957).

[19] *Wood* v. *Wood*, 263 Ala. 384, 82 So. 2d 556 (1955); *City of Montgomery* v. *Mott*, 266 Ala. 422, 96 So. 2d 766 (1957); *Quinn* v. *Hannon*, 262 Ala. 630, 80 So. 2d 239 (1955); *Schmale* v. *Bolte*, 255 Ala. 115, 50 So. 2d 262 (1951); *Simmons* v. *Cochran*, 252 Ala. 461, 41 So. 2d 579 (1949); *Edge* v. *Bice*, 263 Ala. 273, 82 So. 2d 252 (1955).

points made and requesting relief;[20] the brief which must accompany the opinion elaborates the arguments.[21] But the brief itself need not be filed on transcript paper.[22] Ordinary legal cap paper also will suffice for petitions for rehearing, *Redwine* v. *State*, 36 Ala. App. 560, 61 So. 2d 715 (1952). The requirement as to the size of the paper to be used in certiorari petitions is not relevant to the ultimate just adjudication of claims, as are numerous procedural requirements. It is unlike time limits which help establish finality of decisions. It does not regulate the flow of business in the courts, thereby affecting the just and prompt disposition of other litigation. It does not serve any interests of the opposing party. It is not like rules which aid the court in properly understanding and disposing of the merits of a case, as might be true with rules governing the contents of briefs or assignments of errors or even rules regulating the size of type or printing or to insure legibility.[23] While it is a rule, and should be obeyed and not deliberately flaunted, it relates only to record keeping and filing problems—to binding the record and storing it in filing racks of a particular size. This is not a consideration to be ignored and Alabama might perhaps treat it by means of cost type sanctions, or by requiring resubmission of documents on proper size paper, or perhaps even by striking state law claims, but petitioner submits Alabama cannot foreclose this Court from considering federal constitutional issues on the basis of

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[20] See, Jones, Alabama Practice and Forms, §§6392, 6393; Ala. Supreme Court Rule 39.

[21] Ala. Supreme Court Rule 39.

[22] Ala. Supreme Court Rule 8 provides only that briefs be typed or printed, clearly legible, and bear the name and address of counsel.

[23] Cf. Rosenberg & Weinstein, *Elements of Civil Procedure*, pp. 2-3 (Foundation Press, 1962).

that determination. This Court may well determine that its interest in protecting the constitutional rights of those charged with crime and threatened with imprisonment through flagrant infringement of the constitution weighs more heavily than any obligation to defer to state procedural peculiarities bearing no relation to the decision making process. In *Staub* v. *Baxley*, 355 U. S. 313, the Court rejected an argument that failure to comply with a state requirement that a defensive pleading "count off, one by one, the several sections of the ordinance" was an adequate state ground. The requirement was characterized as "an arid ritual of meaningless form." Similarly in *Rogers* v. *Alabama*, 192 U. S. 226, this Court disregarded an asserted nonfederal ground based on the prolixity of a pleading. In *Carter* v. *Texas*, 177 U. S. 442, it refused to allow a defendant's federal claim to be evaded on the ground that his bill of exceptions did not list the witnesses he proposed to call and their intended testimony.

The nonfederal ground put forward in this case has even less substance than those in the *Staub*, *Rogers*, and *Carter* cases where the state grounds, though procedural, at least had a connection with the decision making process. The state ground put forward by Alabama here relates to a mechanical requirement totally unrelated to the rights of other litigants, or to the effective functioning of the court, or to the merits of the case, which no litigant would intentionally disobey, and the breach of which might readily be cured if the state rule did not work a strict forfeiture.

Finally, in *Hammerstein* v. *Superior Court*, 341 U. S. 491, this Court held that it need not consider the force of an expression by the California Supreme Court that its denial of hearing from the judgment of a lower court was based on an adequate state ground, where the federal ground had been decided by the inferior court. The Court

said: "We do not consider the force of that statement since it is clear that the judgment properly before us is that of the District Court of Appeal, which did decide the federal question. . . . We have jurisdiction over that judgment." (341 U. S. at 492.) This was a holding that where an inferior court was the highest court in which a case might be heard as of right, and an attempt had been made to secure discretionary review in the state's highest court, it did not matter that the latter court might have declined review because it conceived that an adequate state ground supported the judgment. Application of this principle would permit this Court to review the judgment of the Alabama Court of Appeals in the instant case. It should be noted that this result is not at all affected by the outcome of the *Hammerstein* case—the fact that this Court declined to exercise its discretionary jurisdiction. That result obtained because of a circumstance not at all present here, e.g., Hammerstein's failure in a parallel but separate proceeding to use the remedy which could have gained him a review of the same issues as of right. Indeed, there is a substantial qualitative difference between a procedural lapse which pertains only to form like petitioner's, and the mistake made in cases where the wrong remedy was sought, as in one aspect of *Hammerstein, supra* (mistaken use of certiorari rather than appeal) and in *McMaster* v. *Gould*, 276 U. S. 284 (attempted appeal without leave of court). Petitioner's mistake did not work any impediment limiting the Alabama Supreme Court's practical opportunity to exercise its discretionary jurisdiction, or deprive that Court of its jurisdiction. He should not be held to have inadvertently waived his right to review by this Court of the plain errors of constitutional dimension upon which his conviction and the Alabama Court of Appeals' affirmance of it rest.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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